In the Supreme Court of the United States.

OCTOBER TERM, 1904.

GIOVANNI LAVAGNINO,
Plaintiff in Error,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE SAINT JOE MINING COMPANY, A CORPORATION,
Defendants in Error.

No. 120

Brief of Defendants in Error.

STATEMENT.

The petition of plaintiff in error, for the purposes of this brief, we will admit, sets forth the proceedings as they occurred in the District Court and Supreme Court of the State of Utah.

We desire, however, to call the court's attention to some additional facts in connection with the trial of said cause in the Third Judicial District Court.

First—That J. Fewson Smith, Jr., on the 1st day of January, 1896, at the time of making the alleged location of the Yes You Do lode mining claim, was a deputy United States mineral surveyor for the district of Utah, it being the district wherein said mining claim was located; and

that said Smith was such deputy United States mineral surveyor at all times from said January 1st, 1898, to the time of trial. (Tr. 47-49.)

Second—That said Smith, as such deputy, made the survey for the adverse proceedings in the land office, while he was the owner of said Yes You Do mining claim. (Tr. 57, 63.)

Third—That said Smith, as such deputy, made the plats and maps for the adverse in the land office, and the maps and exhibits for the plaintiff and introduced in evidence by the plaintiff at the trial, and that said Smith had an interest in the said Yes You Do mining claim during all of said time. (Tr. 49-63-71-72.)

Fourth—That said Smith knew he could not bring the protest in his own name while he held an interest. (Tr. 67.)

Fifth—That the only consideration paid by the plaintiff, Lavagnino, up to the time of trial was the sum of one dollar. (Tr. 66.)

Sixth—That when said Smith transferred the land and ground to Lavagnino it was for the purpose of defeating these other claims, and not with a view of making much. That he had no love for the other locators or their possessors, and that his ambition was to knock them out. (Tr. 66, 69.)

Seventh—That the plaintiff, Lavagnino, knew that said Smith was a deputy U. S. mineral surveyor, for the said Smith, as such, made the survey and plats for the land office, and the maps for the District Court. (Tr. 69.)

With the foregoing facts in evidence before the District Court, the plaintiff offered in evidence a certified copy of the location notice of the Yes You Do, and the deed to Lavagnino in connection therewith, to which offer the defendants objected, upon the ground:

That the same is incompetent, irrelevant and immaterial, for the reason that by the testimony of the witness it appears that it was not located by a person who had the power under the act of Congress to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned, January 1, 1898, a deputy United

States mineral surveyor for Utah, and therefore incompetent to make locations.

That it appears from the testimony of the witnesses that the time when the protest map and plat were made and the survey made by the surveyor for the purpose of fixing the boundaries for the purpose of the adverse claim and protest, the witness, who made the survey and made the plat which was introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself stated, interested in the title of the claim.

That it appearing affirmatively that the location, when made, was made by a deputy mineral surveyor who was prohibited by law from making it, therefore the location itself was in violation of the law, and could not be the basis of anything to transfer, either the basis of a valid location in himself or any basis to deed to anybody. The court sustained the objection to the offer in evidence of the certified copy of the location notice and the deed in connection therewith, upon the ground that under the law, J. Fewson Smith, Jr., the locator of the claim, was prohibited from making the location of a lode mining claim; and therefore had not the qualifications to initiate any title by any act, that he did with reference to the locating of the Yes You Do mining claim. No exception was taken to the ruling of the court by the plaintiff. Thereupon the plaintiff rested. (Tr. 72, 73 and 74.)

The defendant then introduced evidence showing that on or about the 1st day of January, 1889, one, Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain Mining District, Salt Lake County, State of Utah, and having discovered thereon a lode of mineral bearing rock in place bearing lead, iron, silver and other minerals, did then and there locate the same as the Uhlig No. 1 and Uhlig No. 2 lode mining claims, by marking the boundaries thereof upon the ground with suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the point of discovery on said mining claims respectively,

notice of location, describing the same by reference to natural objects and permanent monuments.

That thereafter he caused copies of said notices of location respectively to be duly filed and recorded in the office of the District Recorder of said West Mountain Mining District. That thereafter the said Edmund H. Uhlig, and the defendant, the Saint Joe Mining Company, remained in possession of said mining claim, and worked and developed the same, causing to be done thereon and for the benefit of said claims in each and every year and including the year 1900 the annual assessment work required by the laws of the United States, and expended upon said mining claims the sum of $1,200, in the year 1897, the year prior to the location of the said Yes You Do lode mining claim. That thereafter, judgment was entered in favor of the defendants and against the plaintiff, and findings of fact, conclusions of law and decree in favor of the defendants were filed and entered of record, in accordance with said facts, by the said Third Judicial District Court. (Tr. 37.)

That thereafter the said plaintiff, Lavagnino, took an appeal to the Supreme Court of the State of Utah, assigning as error the sustaining of the objection to the admission in evidence of the certified copy of the location notice of the Yes You Do and the deed to Lavagnino offered in connection therewith. The Supreme Court of the State of Utah, after stating the facts, held that under Section 452 of the Rev. Stat. of the U. S. said J. Fewson Smith, Jr., as such deputy United States mineral surveyor was prohibited from making mining locations, and that the objection to the admission in evidence of the certified copy of the notice of location of the Yes You Do and deed to Lavagnino, offered in connection therewith, were properly sustained. The Supreme Court of the State of Utah further held, that the defendants were in possession of said Uhlig No. 1 and Uhlig No. 2 for more than seven years, and were entitled to hold the same under the Statutes of Limitations; and further held:

"In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United

States mineral surveyor, as the location of the Yes You Do was not made until eight years after the said possession of the Uhlig No. 1 and Uhlig No. 2 was begun, could not avail himself of any rights which the said Mayberry may have had."

And affirmed the decree of the court below.

From said decision of the Supreme Court of the State of Utah, the plaintiff seeks to come to this court on a writ of error, assigning as error the sustaining of the objection to the admission in evidence of the certified copy of the notice of location of the Yes You Do and the deed to Lavagnino offered in connection therewith in the trial court, and the affirming of the same by the Supreme Court of the State of Utah.

ARGUMENT.

Section 452, U. S. Rev. Stat., provides: "The officers, clerks, and employees in the general land office are prohibited from, directly or indirectly, purchasing or becoming interested in the purchase of any of the public land. Any person who violates this section shall forthwith be removed from his office."

Sec. 453 of the Rev. Stat. of the U. S. provides: "The commissioner of the general land office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of public lands of the United States, or in any wise representing such public lands, and also such as relates to private claims of land and the issuing of patents for all agents of land, under the authority of the government."

The public land act giving the mode of procedure and the duties of officers in connection with the public lands, including mineral lands, will be found in "Title 32" Rev. Stat. of the U. S., and beginning with Sec. 2207 and ending with Sec. 2490.

Section 2223 of said title: "Every surveyor general

shall engage a sufficient number of skillful surveyors, as his deputies, to whom he is authorized to administer the necessary oaths upon their appointment. He shall order and frame regulations for their direction not inconsistent with law or the instructions of the general land office, and to remove them for negligence or misconduct in office."

Section 2334: "The Surveyor General of the United States may appoint in each land district containing mineral land as many competent surveyors as shall apply for appointment to survey mining claims."

Section 2478: "The commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this title, not otherwise specially provided for."

Said sections show the complete supervision which the Secretary of the Interior and Commissioner of the General Land Office have over the surveyors of the public domain.

The Secretary of the Interior, in passing upon said Section 452 in the case of Herbert McMicken et al., Vol. 10, L. D., page 97, decided on the 3d day of February, 1890, holds:

"This is a generalization or enlargement of Section 14 of the act of 1836, which was regarded as superseding the act of 1812. (Note on Revised Statutes U. S., Gould and Tucker, p. 52.) By this enlargement the prohibition or disqualification is extended to all 'officers, clerks and employees in the General Land Office,' and is not limited to persons appointed or employed in an office created by the act of 1812, or to officers whose salaries are provided for by the act of 1836. Do the words 'General Land Office,' as used in Section 452 and quoted above, relate only

to the main or central office located at the seat of government, or were they intended by Congress to embrace also the local offices and offices of Surveyors-General, which may be termed the branches or arms of the central office, through which the Commissioner of the General Land Office discharges 'all executive duties devolved upon him by law appertaining to the surveying and sale of public lands?' (Rev. Stat. 453.) There are two leading subdivisions of the business of the General Land Office, namely, the surveying and the sale or disposal of the public lands. The former is conducted primarily through the offices of the Surveyors-General and the latter through the local land offices. The Commissioner of the General Land Office is required, through the clerk of surveys in his office, to 'direct and superintend the making of surveys, the returns thereof and all matters relating thereto which are done through the offices of the Surveyors-General' (Rev. Stat., Sec. 449), and 'under the direction of the Secretary of the Interior to perform all executive duties appertaining to the surveying of the public lands.' (Ib. 453.) The duties of the Commissioner as to surveys are, in the language of the statute, 'done through the offices of the Surveyors-General,' and these offices are branches and integral parts of the central office; and I am of the opinion, that Section 452 of the Revised Statutes, by the substitution of the general words used therein for the special prohibition contained in prior legislation on the subject was intended to extend the disqualification to acquire public lands to officers, clerks and employees in any of the branches or arms of the public service under the control and supervision of the Commissioner in the discharge of his duties relating to the survey and sale of the public lands. Moreover, in construing a statute, it

> is proper to take into consideration the mischief it was passed to obviate. (Sedg. Stat. Com. Law 202.) The object of Section 452 was evidently to remove from the persons designated the temptation and the power by virtue of the opportunities afforded them by their employment, to perpetrate frauds and obtain an undue advantage in securing public lands over the general public, by means of their earlier and readier access to the records relating to the disposal of, and containing valuable information as to such lands. Officers, clerks and employees in the offices of the Surveyors-General fall clearly within the mischief contemplated by the statute and the reason of the law applies to them with equally as much force as to those in the central office at Washington. Statutes and regulations of this kind are based upon grounds of sound public policy and their strict enforcement is essential to the good of the public service."

This court recognizes that the land department of the Government absolutely controls all matters pertaining to the disposition of public lands of the United States. Congress has seen fit to legislate both particularly and generally upon this subject, and has committed to the Commissioner of the General Land Office ample power over the machinery by which the public lands are controlled, including that part thereof which pertains to the survey of the same. It has created subordinates known as Surveyors-General in the different land districts of the United States and by rules and regulations of the Secretary of the Interior passed and adopted in accordance with law, it has from an early date recognized certain deputies of the Surveyors-General, some of whom are known as Deputy United States Mineral Surveyors. These deputies are, as to many of their functions, mere employees of persons wishing to purchase lands from the United States; as to many other important functions, they are subject to the jurisdiction and control of the Sur-

veyors-General, and as such are officers, agents and servants of the United States who come within the purview of Sec. 452, above noted.

This court will take judicial notice of the public official acts of the executive departments of the United States, and among other official acts of the General Land Office will recognize and take notice of its rules and regulations. We call attention to a few extracts from the latest issue of the regulations issued by the Commissioner of the General Land Office and the Secretary of the Interior, approved July 26th, 1901. These are merely a revision of those which have preceded them and which were in force long prior to January 1, 1898. Certain of the sections which seem pertinent to the matter here under discussion are as follows:

Sec. 115: "Under Section 2334, U. S. Rev. Stats., the United States Surveyor General 'may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims.'"

Sec. 117: All appointments of deputy mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

Sec. 118: The Surveyors-General have authority to suspend or revoke the commission of deputy mineral surveyors for cause.

Sec. 120: The department has authority to investigate charges affecting the official acts of deputy mineral surveyors and will on sufficient cause shown, suspend or revoke their appointment.

Sec. 126: No return by a mineral surveyor will be recognized as official unless it is over his signature as a U. S. deputy mineral surveyor and made in pursuance of a special order from the Surveyor General's office. After he has received an order for survey, he is required to make a survey and return correct field notes thereof to the Surveyor General's office without delay.

Sec. 128: A mineral surveyor is precluded from act-

ing directly or indirectly as attorney in mining claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat with his report to the Surveyor General * * * he will make no survey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner.

Sec. 156: In the Mineral Surveyor's certificate of the value of the improvements all actual expenditures and mining improvements made by the claimant or his grantors, having a direct relation to the development of the claim must be included in the estimate.

Sec. 157: The expenditures required may be made from the surface or in running a tunnel, drifts or cross-cuts for the development of the claim. Improvements of any character, such as buildings, machinery or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of, and actually facilitate the extraction of mineral from, the claim.

Sec. 160: If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the Surveyor General supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

Sec. 167: Mineral surveyors are required to make full examination of all placer claims at the time of survey, and file with the field notes a descriptive report in which will be described (very many different matters pertaining to the quality and composition of the soil, the timber, vegetation, streams, underground workings, proximity of residences and towns, proximity of lode deposits, adaptability of claim for placer, etc., etc.)

> Sec. 169: The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

This court will take judicial notice of the fact that these deputy mineral surveyors are treated and relied upon by the surveyor general of the district for which they are appointed as the working field force of the office. They are required by Section 90 of the Rules and Regulations above mentioned, to enter into such bond, for the faithful performance of their duties, as may be prescribed by the regulations of the land department in force at that time. We understand that the amount of bond now required is ten thousand dollars.

To every office or appointment or employment under the United States in any of its departments of government there are attached certain duties and qualifications peculiar to the particular office, agency or employment. In addition thereto, there are certain limitations growing out of the employment or official relation. No one is obliged to enter into an office or accept from the United States any employment, trust or agency, but once accepted these limitations are binding. For instance, appellant will himself admit that by the express terms of Section 452 a Surveyor General may not locate a mining claim. This statutory provision is reasonable and based on principle of sound public policy, and so long as it ex-

ists, every Surveyor General must recognize its binding force. So also, the department by its rulings and regulations has placed upon its subordinates, to-wit, the deputy U. S. mineral surveyors, certain limitations in respect to the entering of public lands.

It has ruled, and that rule stands as the final and well considered action of the department, that no deputy mineral surveyor is allowed to make a mining location. Mr. J. Fewson Smith, Jr., at the time when he attempted to locate the "Yes You Do" lode mining claim, January 1st, 1898, was a deputy U. S. mineral surveyor. He was subject not only to the express provisions of the Revised Statutes of the United States, as all others are, but subject as well to the rules and regulations of the Commissioner of the General Land Office, and the Secretary of the Interior, with which department he had entered into official relations. He was charged with a knowledge of these regulations and was forbidden by the terms of his official relations, whether he be regarded as an agent, officer, or employee, a clerk, or what not, to locate land under the mining acts of the United States.

This was not a regulation impairing any common right which he had, for the reason that the right to locate lands is entirely statutory, and by the terms of R. S., Section 2319, which gives the only rights in respect to these lands which any person enjoys, it is expressly provided that

> "All valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase and the lands in which they are found to purchase by citizens of the United States * * * *under regulations prescribed by law* * * * so far as the same are applicable and not inconsistent with the laws of the United States."

The land department has had occasion to rule directly on the question of the rights of a deputy U. S. mineral surveyor under Section 452 of the Revised Statutes, in the case of Floyd et al., vs. Montgomery et al., in the 26 L. D., pp.122-136, where the secretary holds as follows:

"In Herbert McMicken et al. (10 L. D., 97, on review 11 L. D., 96), Secretary Noble held that an officer, clerk or employee in the office of a United States Surveyor General is an officer, clerk or employee in the General Land Office within the meaning of this section; in Muller v. Coleman (18 L. D. 394), Secretary Smith held that a deputy surveyor is such an employee, and in the Neill case (24 L. D. 393), the present secretary held that a surveyor general is within the inhibition, so declared. A circular of similar import was issued September 15, 1890. (11 L. D. 348.) From an examination of these authorities and a consideration of the language and manifest purpose of the section, it seems clear that its prohibitive provisions embrace a deputy mineral surveyor. In so far as the case of State of Nebraska vs. Dorrington (2 C. L. L., 647); Dennison and Willits (11 C. L. O. 261) and Lock Lode (6 L. D. 105), are in conflict with the views expressed in these later cases they are overruled."

We desire to call attention of the court to the ex parte matter of the Lock Lode claim, heretofore referred to. The acting secretary held, "it is true, the deputy surveyor is in one sense an officer of the United States in the mining district for which he is appointed. The decision, however, is confined more particularly to the right of claimant as a deputy U. S. mineral surveyor to make the *survey* for his claim; the acting secretary holding that as the claimant did not make the survey and acted in no way except that of a claimant the entry could be allowed. The acting secretary, however, did not construe, nor call attention to said Section 452, and apparently was not aware of the same.

Secretary Hitchcock in the case of Frank A. Maxwell, in 29th L. D., page 76, also holds that said section includes deputy mineral surveyors, and that they are prohibited from making a mineral entry.

Mr. Lindley, in his work on Mines, Sec. 662, in speak-

ing of the powers and duties of the Commissioner of the General Land Office, says:

> "His duty is to perform, under the direction of the Secretary of the Interior, all executive acts appertaining to the surveying and sale of the public lands and also such as relate to private claims for lands, and the issuing of patents for all grants of land under the authority of the government.
>
> He is clothed with liberal powers of control, to be exercised for the purpose of justice and to prevent the consequences of inadvertance, irregularity, mistake or fraud in the important and extensive operations of that office for the disposal of the public domain.
>
> This general power of superintendence gives the commissioner of the general land office direct supervision over registers and receivers whose decisions on all questions he is authorized to review.
>
> Under the direction of the Secretary of the Interior, the commissioner is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of the Federal laws, regulating the sale and disposal of the public lands not otherwise specially provided for.
>
> These regulations, when not repugnant to the Acts of Congress, have the force and effect of laws, and courts take judicial notice of them."

Again, in Section 664, in speaking of the jurisdiction of the land department, he says:

> "With the exercise of its discretionary powers the courts cannot interfere and within certain recognized limits, its judgments are final."

It will be sufficient upon this question to quote the Supreme Court of the United States:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs

exclusively to the political department of the government, and that the action of that department within the scope of its authority is unassailable in the courts except by a direct proceeding."

Knight v. U. S. Land Association, 142 U. S. 161, cited and approved in Gardner v. Bonestell, 180 U. S. 369.

This is a well recognized principle and many authorities might be added. See

Cragin v. Powell, 128 U. S. 591;
Bishop of Nesqually v. Gibbon, 158 U. S. 155.

It certainly cannot be contended that in exercising this important power of correctly and impartially surveying the lands of the United States the Land Department has not the absolute control over the officers or agents through which it acts. Even if Section 452 had never been enacted by Congress the Secretary of the Interior might very properly have formulated a rule forbidding deputy United States mineral surveyors from locating mining claims. The considerations of policy which would support such a rule are fully set forth in the decisions of the land department, above noted.

Even if it should be regarded as a matter into which this court or any court of law might inquire, the practical construction given by the land department to the provisions of Section 452 would be regarded as most persuasive, and certainly be followed.

Hastings etc. Co. vs. Whitney, 132 U. S. 357.

In this case the court says:

"It is true that the decisions of the land department on matters of law are not binding upon this court in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In United States v. Moore, 95 U. S. 760, this court said: The construction given to a statute by those

charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret. See also Brown vs. United States, 113 U. S. 568, and cases there cited; U. S. vs. Burlington & U. R. R. Co., 98 U. S. 341; Kansas Pac. Ry. Co. vs. Atchison, T. & S. F. R. R., 112 U. S. 418."

II.

The plaintiff in error consumes much space in the discussion of the alleged Levi P. and Veta mining claims. We cannot see the materiality of the argument, as the petition for a writ of error nowhere mentions these claims, and the assignments of error do not question the correctness of the rulings of the court on this matter.

The defendants applied for a patent for the Uhlig No. 1 and Uhlig No. 2 lode mining claims, described as follows:

> Commencing at corner No. 1 of said Uhlig No. 1 claim and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said Uhlig No. 2 claim; thence north 50 degrees 38 minutes, east 1,437.8 feet to corner No. 1 of said Uhlig No. 2 claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of Uhlig No. 2 claim; thence south 50 degrees 38 minutes, west 1,437.8 feet to corner No. 3 of said Uhlig No. 2 claim; thence south 20 degrees 12 minutes, east 145.5 feet to corner No. 2 of said Uhlig No. 1 claim; thence south 76 degrees 36 minutes, west 1,151.9 feet to corner No. 3 of said Uhlig No. 1 claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said Uhlig No. 1 claim; thence north 72 degrees 46 minutes, east 1,145.3 feet to corner No. 1 of said Uhlig No. 1 claim, to the place of beginning.

The only adverse proceeding in the land office and before the court, to said application, is for the alleged conflict area between the Yes You Do and the Uhlig No. 1 and Uhlig No. 2, brought by the plaintiff against the defendants, said alleged conflict area is described in plaintiff's complaint as follows:

Conflict area with the Uhlig No. 2 lode:

Beginning at a point on the northerly side line of said Uhlig No. 2 lode mining claim 1,177.6 feet distant from corner No. 1 of said claim, south 50 degrees 38 minutes west from said corner No. 1, running thence south 35 degrees 30 minutes, east 227.4 feet; thence south 54 degrees 30 minutes, west 317 feet; thence north 20 degrees 12 minutes, west 217.6 feet, to corner No. 4 of said Uhlig No. 2; thence north 50 degrees 38 minutes, east 260.2 feet to the place of beginning, an area of 1.441 acres.

Conflict area with said Uhlig No. 1 lode mining claim is described as follows:

Beginning at a point on the westerly end line of the Uhlig No. 2 lode mining claim, 217.6 feet from corner No. 4 of said Uhlig No. 2, running thence south 54 degrees 30 minutes, west 1083 feet; thence north 35 degrees 30 minutes, west 376.1 feet; thence north 20 degrees 12 minutes, west 54.3 feet; thence south 72 degrees 46 minutes, east 1145.3 feet; thence south 20 degrees 12 minutes, east 72.1 feet to the place of begining.

Plats and maps were introduced in evidence as exhibits in the district court, but the plaintiff has not seen fit to make them a part of the record.

For the purpose of showing the relative positions of the Uhlig No. 1 and Uhlig No. 2 with the alleged area in conflict with the Yes You Do, we submit the following plat showing the metes and bounds of said locations, the location of the discoveries together with the alleged area in conflict according to the allegations of the

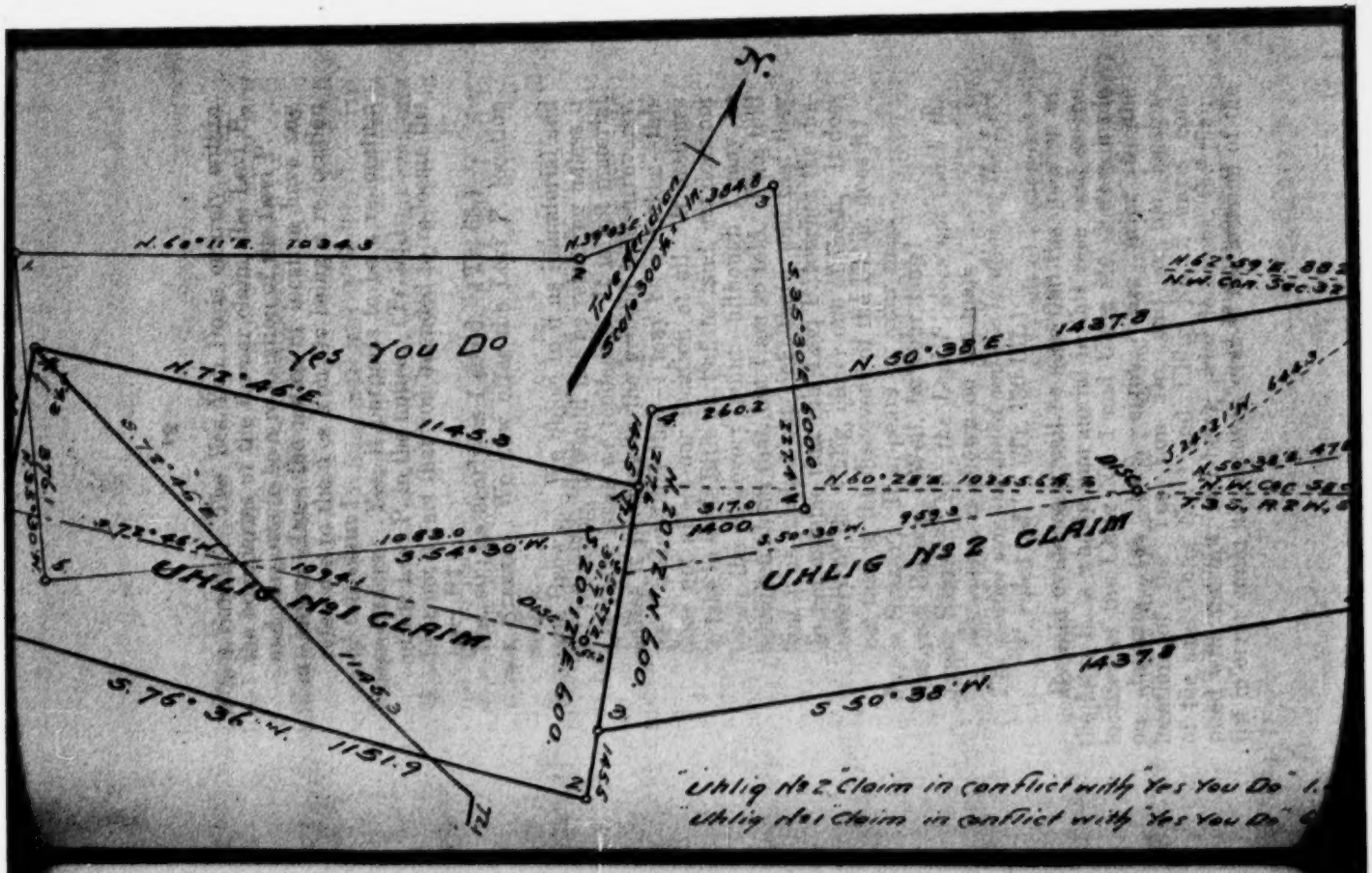
complaint and answer and the testimony adduced at the trial in the District Court. As the adverse in the Land Office and the allegations of the complaint and answer are confined to the conflict area between the Yes You Do and the Uhlig No. 1 and Uhlig No. 2, the evidence must necessarily be confined to that issue, and the evidence can not be expanded to include mythical grievances of other parties who have failed to file adverse proceedings and who claim no interest in the property.

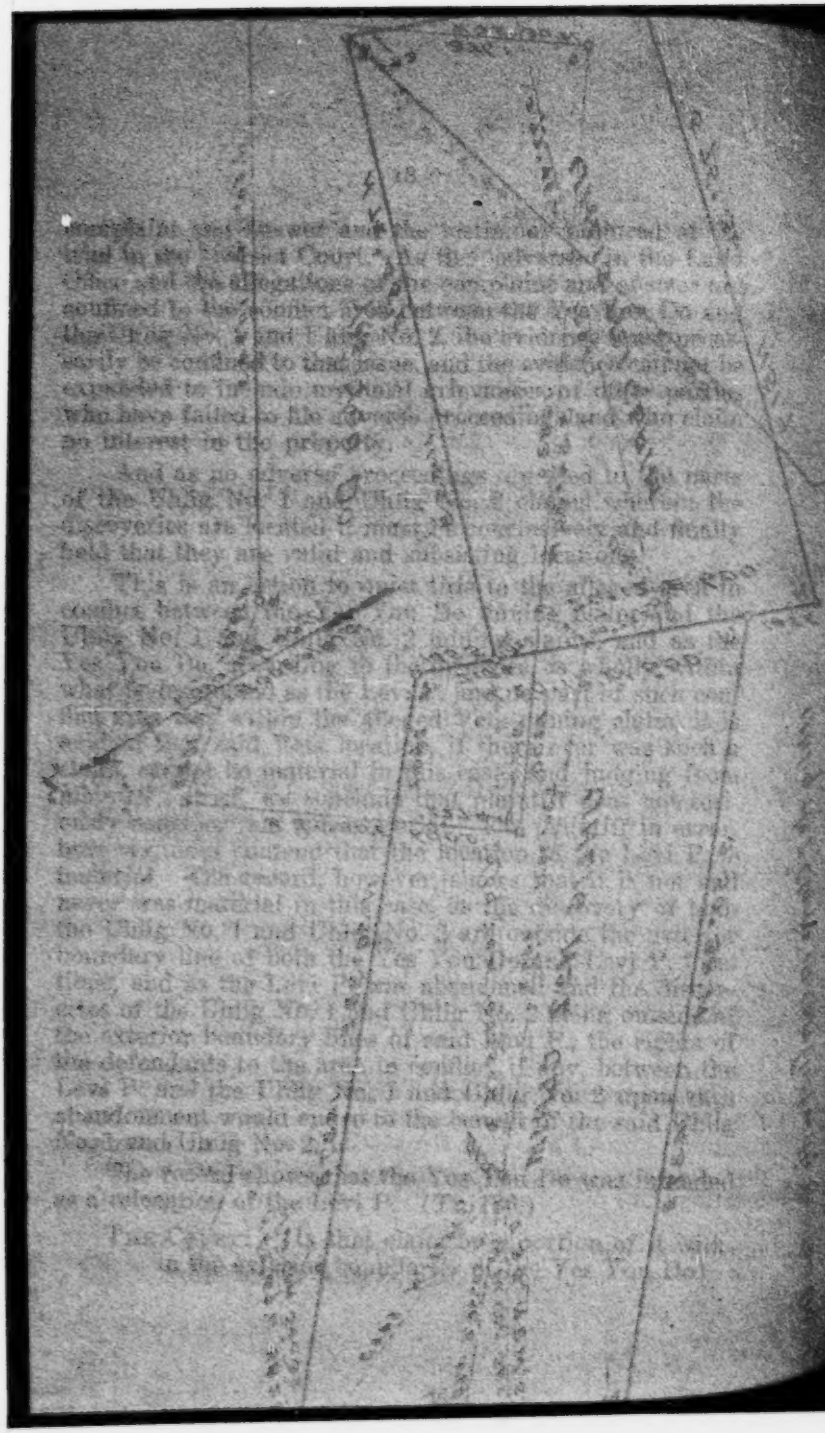
And as no adverse proceedings are filed to the parts of the Uhlig No. 1 and Uhlig No. 2 claims wherein the discoveries are located it must be conclusively and finally held that they are valid and subsisting locations.

This is an action to quiet title to the alleged area in conflict between the Yes You Do mining claim and the Uhlig No. 1 and Uhlig No. 2 mining claims, and as the Yes You Do, according to the evidence, is wholly within what is designated as the Levi P. and no part of such conflict area was within the alleged Veta mining claim, it is evident that said Veta location, if there ever was such a claim, cannot be material in this case; and judging from plaintiff's brief, we conclude that plaintiff does not seriously consider that it is material. The plaintiff in error, however, does contend that the location of the Levi P. is material. The record, however, shows that it is not and never was material in this case, as the discovery of both the Uhlig No. 1 and Uhlig No. 2 are outside the exterior boundary line of both the Yes You Do and Levi P. locations, and as the Levi P. was abandoned and the discoveries of the Uhlig No. 1 and Uhlig No. 2 being outside of the exterior boundary lines of said Levi P., the rights of the defendants to the area in conflict, if any, between the Levi P. and the Uhlig No. 1 and Uhlig No. 2 upon such abandonment would enure to the benefit of the said Uhlig No. 1 and Uhlig No. 2.

The record shows that the Yes You Do was intended as a relocation of the Levi P. (Tr. 136.)

THE COURT: "Is that claim or a portion of it within the exterior boundaries of the Yes You Do?


N.
True Meridian
Scale 300 ft. = 1 in.
N. 60° 11' E. 1034.3
N 39° 03' E. 384.8
S. 35° 30' E. 600.0
N 62° 59' E. 88.2
N.W. Cor. Sec. 32
Yes You Do
N. 77° 46' E.
1145.3
N. 50° 38' E. 1437.8
260.2
1274
N 60° 28' W. 1035.6 ft.
Disc.
N. 50° 38' E. 471
N.W. Cor. Sec.
T. 3 S., R. 2 W.
S. 77° 46' E.
1145.3
N. 39° 03' W. 1978
S. 77° 46' E.
1088.0
S. 54° 30' W.
1034.1
317.0
1400.
S. 50° 38' W. 959.3
UHLIG No 2 CLAIM
UHLIG No 1 CLAIM
Disc.
N. 20° 02' E. 600.
N. 71° 02' W. 600.
S. 76° 36' W. 1151.9
1145.3
S 50° 38' W. 1437.8
"Uhlig No 2" Claim in conflict with "Yes You Do"
"Uhlig No 1 Claim in conflict with "Yes You Do"



JUDGE STREET: The Yes You Do is entirely within the boundaries of the former claim, the Levi P., and purports to be a re-location of the Levi P.

THE COURT: Does the notice of location have any reference to the Yes You Do being a re-location of this claim?

JUDGE STREET: Yes, it purports to be a re-location of the Levi P. in the notice. (Tr. 52.)

Q.—Is it not a fact that you intended to re-locate the Levi P?

A.—Yes, sir; as nearly as I could. (Tr. 65.)

JUDGE STREET: We now offer the Levi P. location notice.

SENATOR BROWN: We object to it as immaterial and not rebutting, it would not be rebutting unless it met some issue we tendered. It is not material unless it pertains to the ground in controversy. As I understand this—I may be mistaken—this does not affect our location at all. It assumes to take in some little part of the land, but does not touch the discovery point—although I may be mistaken about that, but I am so told. I am told that it is marked out right there, and that they do not assume that this Levi P. touches the discovery of the Uhlig, either one of them. It does not take in the discovery of the Uhlig, does it?

JUDGE STREET: It appears by your map.

SENATOR BROWN: Well, by your map?

JUDGE STREET: No; *the Levi P. does not touch the discovery,* as shown on the map.

The motion was sustained and the location of the Levi P. ruled out." (Tr. 130-131.)

By said evidence it will be seen that the question of the Levi P. is wholly immaterial in this case, and as the location of the Uhlig No. 1 and Uhlig No. 2 were made on January 1st, 1889, eight years prior to the location of the Yes You Do, and as the locators of the said Uhlig No. 1 and Uhlig No. 2 have complied with the law, and being prior locations, the plaintiff in error could not recover, even if the location of the

Yes You Do had not been made by a deputy United States mineral surveyor, for the reason that said Yes You Do was the junior location, as shown by the record.

The ghosts of dead and abandoned locations, without adverse proceedings, can not be resurrected for the purpose of defeating the rights of citizens who in good faith are developing the mineral resources of the United States, and applying for patents to mining claims.

Section 2326 Rev. Stat. U. S., among other things provides:

> "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; *and a failure so to do shall be a waiver of his adverse claim.*"

When the plaintiff in this case attempted to introduce evidence tending to show that not he, but Mayberry, held this mineral ground by a valid location in 1889, when the Uhlig claims were located, he was met by the absolute and positive provision of the statute, to the effect that Mr. Mayberry and any and every person whomsoever, excepting the plaintiff in this case, had waived all rights to the ground in controversy, and further by an assumption or presumption absolutely binding and conclusive upon the courts, that whatever claim Mr. Mayberry had in the land was inferior to the rights of the defendant to patent the ground.

The Supreme Court of the State of Utah in passing upon this question, refer to the sections of the Revised Statutes of the United States, and quote authorities, and say:

> "We think it is clear, both from the language of the sections of the Revised Statutes referred to and the authorities cited, that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any

adverse claim, had none, and as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendant's claim. While Mayberry has the right, like any stranger, to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and the plaintiff in this case and all other strangers to the title are likewise precluded from protesting on like grounds." (Tr. 147.)

The defendants therefore respectfully submit that the decision of the Supreme Court of Utah should be affirmed.

Respectfully submitted,
ARTHUR BROWN,
D. H. WENGER,
Attorneys for Defendants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND SAINT JOE MINING COMPANY.

Supplemental Statement of Facts to Defendants' Brief.

It is not admitted by the defendants that the Levi P. and Veta mining claims were located prior to the Uhlig No. 1 and Uhlig No. 2 mining claims. The record shows that all of said claims were located on the same day.

Mr. MAYBERRY, the locator of the Levi P. mining claim, was interrogated:

Q. Will you please explain this Plaintiff's Exhibit No. 2 and indicate where the discovery of the Levi P. claim was?

A. I do not know about that map. There is nothing on there that would indicate where the discovery was. There was a bluff; if that was on the map, I could tell.

Q. There is nothing there to indicate the location of the Levi P.?

A. Not on the map (Tr., 117).

Q. Have you examined the map to see whether that is correct so far as the Levi P. is concerned?

A. I could not say whether that is correct or not.

Q. Do you say "yes" or "no"?

A. I can't say whether it is correct or not (Tr., 128).

Mr. J. FUSON SMITH, JR., deputy U. S. mineral surveyor, who made the location of the Yes-You-Do, was interrogated as follows:

Q. Did you know at the time you located this ground of a claim called the Levi P.? Had you examined as to the location of that claim?

A. Why——

Q. (Continuing:) I mean where it was located on the ground.

A. I had inquired (Tr., 52).

Q. Where did you get your data to plat the Levi P. location and Veta location?

A. From information furnished by Mr. Mayberry, the location notice, and points on the ground. *I won't say corners* (Tr., 57).

What can this court, or any court, know about a conflict area if it is not platted by metes and bounds, and how could the conflict area be shown without reference to the corners of the claims; and if the locator, who should be familiar with his own claim, can find no conflict, how can a stranger, without knowing where the corners are located, be able to show there is a conflict? We will go still farther with the record. The location notice of the Yes-You-Do is described as commencing at the *southeast* corner of the No-You-Don't mining claim; thence northeasterly 1,500 feet to

the common corner of the No-You-Don't and the Yes-You-Do; thence southeasterly 600 feet; thence southwesterly 600 feet; thence northwesterly 600 feet to the place of beginning.

Location notice, Tr., 136.

MAYBERRY testifies:

I started at the *southwest* corner of the No-You-Don't; made that a common corner for the Levi P.; it would be the northwesterly corner of the Levi P. and the southwest corner of the No-You-Don't; thence southerly 300 feet, more southerly than easterly, to common corner of the Levi P. and Veta. Next corner was a Veta corner 300 feet down the hill, 600 feet down the hill from the common corner; next, southeasterly corner of the Levi P. and northeasterly of the Veta 1,700 feet (Tr., 118, 119).

So that according to the record there was no conflict and could be no conflict between the Levi P. and Veta on the one hand and the Uhlig No. 1 and Uhlig No. 2 on the other, and this according to plaintiff's testimony. The offers made by plaintiff contradict the testimony of his own witnesses.

The defendants made no objections to the plaintiff proving the locations of the Levi P. and Veta to be valid locations, provided it was shown that they were in conflict with Uhlig No. 1 and Uhlig No. 2. The defendants objected to the notice of location of the Levi P. upon the ground that it did not show that said locations were in conflict with the defendants' claims.

Mr. Sonnedecker and Mr. Howat, who drew and signed the petition for the writ of error, were familiar with the facts and the record, and made no claims on account of the Levi P. and Veta locations, and they undoubtedly were familiar with the exhibits which the plaintiff in error did not see fit to make a part of the record in the supreme court of Utah nor in this court, and, being so familiar, made no objections to the rulings of the court on the matter of the

Levi P. and Veta, and as the petition for writ of error fails to mention this matter and no assignments or error are claimed in connection therewith, and the evidence fails to show any conflict area with the Uhlig No. 1 and Uhlig No. 2, it should, therefore, have no place in this hearing.

Respectfully submitted.

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